EUFJE 2006
Helsinki, 15 – 16 September

Impact of Natura 2000 sites on Environmental licensing

Finnish Report

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A. Natura 2000 sites

1. Country or area

Finland (the whole national territory covering some 338 000 square kilometres)

2. Number and area of sites

SCI/SAC: 1 715 (4,8 million hectares, covering some 14 per cent of the state territory)

SPA: 467 (3,1 million hectares, covering some 9 per cent of the state territory)

However, a considerable number of areas have both an SCI/SAC and an SPA status, which means that the Finnish national proposal of SCIs and classification of SPAs include 1 860 sites altogether.

The European Commission has adopted the list of SCIs on the alpine biogeographical region on 22nd December 2003 and on the boreal region on 13th January 2005. These decisions include 1 632 Finnish SCIs covering roughly 4,6 million hectares, hosting certain natural habitat types listed in Annex I of the Habitats Directive or habitats of the species listed in Annex II of the Directive. The lists adopted by the Commission do not include certain sites, the proposal of which is under appeal or which are included in later national decisions amending earlier proposed sites by new or enlarged sites (see below under 7.).

[1] The authors wish to thank Justices Jan Eklund (Vaasa Administrative Court) and Tuula Pynnä (Supreme Administrative Court) and Ministerial Secretary Heikki Korpelainen (the Ministry of the Environment) for valuable comments.

3. Which authority drafted the national Natura 2000 site list?

Each Regional Environment Centre (13 in all) assessed potential Natura 2000 sites within their administrative area and drafted a list of sites to be included in the network. The Ministry of the Environment proposed the national list on the basis of this preparatory work by the Regional Environment Centres, the Finnish Environment Institute and the Natural Heritage Services. The list was submitted to the Council of State (the Cabinet) for approval.

4. How were the sites chosen? Was there a screening of possible sites and field surveys of competing site candidates? Were existing conservation areas designated as sites?

Existing scientific data in e.g. nation-wide nature protection programmes, academic publications and data bases of environmental authorities were utilised and supplemented by on-site examinations where necessary and to the extent feasible considering the narrow time frame.

Existing conservation areas were not as such proposed to be included in the network Natura 2000. However, the scientific data, on the basis of which the site had been designated as a protected area or included in a nation-wide nature conservation programme, were used as a starting point in assessing the protective value a possible site. If the data still were deemed to give a reliable basis for the assessment of values presupposed in the Birds and Habitat Directives they were, of course, utilised.

Nature conservation programmes having relevance in this respect were e.g. the Mire Conservation Programme, the Waterfowl Habitats Conservation Programme, the Herb-rich Forest Conservation Programme, the Shore Conservation Programme, the Programme for the Protection of Old-Growth Forests, and to some extent also, the Programme for the Protection of Gravel Eskers. The aim of these programmes had been to protect representative samples of Finnish nature. In the drafting of these programmes, the relevant nature types and biotopes had been screened, evaluated and rated and the most representative sites had been included in the programme.

> *Which authorities participated in the screening process? Did NGOs have a say? Was there a public debate on the criteria for choosing sites? Did (or does) the public have access to the biological data, on the basis of which decisions were made?*

The screening of Natura 2000 sites was led by the Regional Environment Centres under the guidance of the Ministry of the Environment and the Finnish Environment Institute. Also the authorities in charge of the state-owned protected areas, the Natural Heritage Services and the Finnish Forest Research Institute were involved. The draft proposal by the Ministry, including summaries of the Natura 2000 Data Forms concerning the proposed sites, was published and

submitted for comments by landowners and other right and stake-holders, state and municipal authorities, and NGOs. The proposal was publicly announced on municipal notice boards and in the local press. During the hearing procedure, this material was held accessible in the municipality in question and in the Regional Environment Centres, which gave closer information concerning the proposed sites.

5. Which authority decided which sites were to be included in the Natura 2000 network?

On the basis of the opinions and comments collected during the hearing procedure the Ministry of the Environment compiled the draft proposal and submitted it to the Council of State. The Council of State adopted the national proposal in plenary session.

6. Appeals against the Natura 2000 national network decision. Which authority decided on the appeals, which parties had legal standing and on what grounds could appeals be lodged?

The decision taken by the Council of State concerning Natura 2000 sites can be appealed to the Supreme Administrative Court (hereinafter SAC). It may be pointed out that, according to sections 65 and 66 of the Nature Conservation Act (see under 9. below), the legal effects set out in Article 6, paragraphs 3-4, of the Habitats Directive, took effect immediately after the national proposal was adopted by the Council of State.

The right to appeal belongs to those whose rights or interests are affected by the matter in question (e.g. a landowner within or in the vicinity of the proposed site or holder of a hunting or fishing right). The decision to adopt the proposal can also be appealed by the municipality in question. Also certain NGOs have standing in cases concerning adoption of the national proposal: the right to appeal belongs to any registered local or regional association whose purpose is to promote nature conservation or environmental protection and, furthermore, to a corresponding national organisation or any other organisation safeguarding the interests of landowners.

7. Number and success of appeals

Initially, the Council of State adopted the national proposal for SCIs and classification of SPAs by its decision 20th August 1998. Because of an error in the hearing procedure, the decision was amended by a decision 29th March 1999 concerning the area of the city of Espoo. These two decisions form the basis of the national proposal for network Natura 2000.

Against the decision of the Council of State a number of appeals were lodged in the Supreme Administrative Court. In all, the Court received more than 850 appeal documents, in which some 750 sites included by the basic national

proposal were challenged. In several appeals it was demanded that the decision should be repealed either in its entirety or concerning a certain site or a part thereof. In some appeals, mostly by environmental NGOs, it was required that a site, which had been intentionally left out from the draft proposal or a site or a category of sites (e.g. Important Bird Areas, IBA), which was not even initially included in the draft proposal, should be included in the network. Hence, the total number of recorded appeals exceeded 1 600 and more than 5 000 appellants took part in the procedure at the Supreme Administrative Court. The Supreme Administrative Court gave its decisions mostly on 14th June 2000, some 40 000 pages in all.[2]

The majority of the appeals were disallowed. However, concerning some sites the decision of the Council of State was found to be in contradiction with the law and, hence, repealed and typically referred back to the Council of State for reconsideration. This was the case concerning 42 sites.

Reasons for revocation included i.a. insufficient scientific information about the habitat types or species hosted by the site or missing observations of relevant bird species[3] and impairment of the habitat through e.g. ditching, logging or soil excavation, if the relevant part could feasibly be delineated out of the boundaries of the site without compromising the integrity of the site. Moreover, the decision was considered to be contrary to law, if a larger piece of forestland or mineral soil had been included in a site designated to conserve marsh habitats or if a built-up real estate was included in the site even though the other comparable real estates had not been included in the site.[4] From the opposite point of view, the decision was found illegal also in some cases, where the non-designation or dropping out of a site or a part thereof had not been based on natural scientific or ornithological criteria (e.g. in order to facilitate future mining or military activities[5]).

The basic proposal has later on been amended by three decisions of the Council of State, viz. 8.5.2002, 22.1.2004 and 2.6.2005.

The amendment of 2002 concerned 289 new or enlarged sites. The Supreme Administrative Court recorded 63 appeals challenging the designation or non-designation of some 60 sites. The majority were appeals of NGOs requiring designation of certain IBA areas but quite a number of these appeals were declared inadmissible because the Council of State had not, in effect, taken a stand to these questions in its decision. In other words, even if the network was

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[2] See also Pekka Vihervuori, Finland, Environmental Law – Suppl. 42 (2003), International Encyclopaedia of Laws, at 375.
[3] See e.g. SAC 2000:40 (case Vaarunvuoret) and SAC 2000:43 (case Saimaa ringed seal habitats).
[4] Cf. SAC 2000:41 (case Preiviikinlahti), where the result was the opposite because the site had been delineated so that minor built-up areas were included in the area. In other words, in was not found illegal to delimit a site coherently so that no "holes" were left inside the uniform boundaries of the site, even if no habitat types or habitats of species deserving protection obviously could be found in the courtyard of a summer cottage or in a marina for small boats. See also the definition of *site* in the Habitats Directive (Article 1, subparagraph j) and SAC 2000:44.
[5] E.g. SAC 2000:42 (case Vattajanniemi).

amended, it had not been decided that e.g. IBA areas would not eventually be included in the network later on. The other appeals were disallowed, excluding one appeal of an NGO and one appeal of a landowner. Later on, the latter case led to reducing of the site by some seven hectares after the reconsideration by the Council of State.

The amendment of 2004 contained 36 sites, which had been referred back to the Council of State by the Supreme Administrative Court in 2000 (6 sites had been resolved already in the amendment of 2002). The Supreme Administrative Court registered 24 appeals concerning 10 sites. The appeals were either dismissed or disallowed.

The latest amendment of 2005 covered 44 new proposed SCIs and the enlargement of 8 existing SCIs, two of which were at the same time enlargements of SPAs (in all, 2 673 hectares). The decision also meant classification of 14 new SPAs covering 220 564 hectares. The Supreme Administrative Court registered 17 appeals concerning 8 sites. The appeals are pending at the Supreme Administrative Court.

B. Conservational status of Natura 2000 sites

8. Status of Natura 2000 sites. Do Natura 2000 sites also have the status of nature reserves, national parks or other nature protection areas?

The vast majority (97 per cent) of Natura 2000 sites are included in nature conservation areas, founded previously by national acts and decisions, or in the national nature conservation programmes or areas protected by other national measures (e.g. the Wilderness Act, the Outdoor Recreation Act and planning under the Land Use and Building Act). Almost half of the total area of the network will be finally implemented as protected areas in accordance with the Nature Conservation Act.

9. Protection of Natura 2000 sites. How has Article 6 of the Habitats Directive been transposed into national law in your country? By special national law implementing the Directive, by other national law, etc. How is the protection of Natura 2000 sites safeguarded? Are there site-specific management plans or other rules of conduct regulating activities within the sites?

Article 6, paragraphs 3 and 4 have been transposed into national law in the Nature Conservation Act (1096/1996). Sections 65 and 66 of the Act read as follows[6]:

"*Section 65. Assessment of Projects and Plans.* If a project or plan, either individually or in combination with other projects or plans, is likely to have a significant adverse effect on ecological values, for the purpose of protecting of which a site has been included in, or proposed by the Council of State for

[6] About the system see e.g. Vihervuori 2003, at 376-377.

inclusion in, the Natura 2000 network, the project´s planner or implementer is required to conduct an appropriate assessment of its impact. The same shall correspondingly apply to any project or plan outside the site, which is liable to have a significantly harmful impact on the site. The assessment of impact can also be conducted as a part of the assessment procedure described in chapter 2 of the Act on Environmental Impact Assessment Procedure (468/1994).[7]

The authority in charge of granting the permit or approving the plan shall see that the assessment referred to in subsection 1 is carried out. The authority shall thereafter request an opinion from the Regional Environment Centre and the authority in charge of the site in question. If the Environment Centre itself is the implementer of the project, an opinion shall be requested from the Ministry of the Environment. The opinion shall be given without delay, within six months at the latest.

An authority notified in due procedure, as prescribed by act or decree, of a project or plan referred to in subsection 1, shall take steps within its jurisdiction to suspend the implementation of the project or plan until the assessment described in subsection 1 is carried out and the opinions referred to in subsection 2 have been submitted. The authority shall also notify the Regional Environment Centre of the matter at a sufficiently early stage for the Regional Environment Centre to take any necessary action."

"*Section 66. Granting of Permits and Adoption and Ratification of Plans.* No authority is empowered to grant a permit for the implementation of a project, or to adopt or ratify a project or a plan, if the assessment procedure or the requested opinion referred to in section 65, subsections 1 and 2, indicates that the project or the plan at issue has a significant adverse effect on ecological values, for the purpose of protecting of which a site has been included in, or proposed by the Council of State for inclusion in, the Natura 2000 network.

Without prejudice to the provisions of subsection 1, a permit can be granted and a plan can be adopted or ratified if the Council of State decides that the project or the plan must, in the absence of alternative solutions, be carried out for imperative reasons of overriding public interest.

Where a site hosts a priority natural habitat type referred to in Annex I, or a priority species referred to in Annex II, of the Habitats Directive, a further precondition for granting a permit or adopting or ratifying a plan is that a reason relating to human health or public safety, or to beneficial consequences of primary importance for the environment, or any other imperative reason of overriding public interest so demands. In the latter case, an opinion shall be requested from the Commission."

In section 67 of the Nature Conservation Act, the possibility of intervention of the Commission (see Article 5 of the Habitats Directive) has been taken into consideration by prescribing that sections 65 and 66 shall correspondingly apply to a site which the Commission has reported as being under consideration for inclusion in the Natura 2000 network. Correspondingly, should the Commission

[7] It may be mentioned that the wording of paragraph 1 was amended by Act 553/2004, which was linked to the decision of the European Court of Justice in case C-407/03, Commission v. Finland.

reject a site proposed as an SCI the provisions in sections 65 and 66 no longer apply.

One more provision of the Act should be presented here, namely section 69, subsection 2, which deals with compensation for deterioration of the network:

“If a protection order on a Natura 2000 site is lifted, or the provisions on its protection weakened, or an authority has granted a permit or adopted or ratified a plan under section 66, subsection 2 or 3, and the decision leads to deterioration or the overall coherence of the Natura 2000 network or its natural values, the Ministry of the Environment shall take immediate action to compensate for said deterioration.”

As far as paragraphs 3 and 4 of Article 6 are concerned, the Finnish implementation seems to be adequate, insofar sections 65 and 66 are interpreted in the light of the Habitats Directive and precedents of the European Court of Justice. In principle, however, a general ban on deterioration of the ecological values of Natura sites is missing. Sections 65 and 66 are tightly linked to permit procedures etc. but where a project, activity or plan may legally be carried out without a permit or adoption of a plan, the said sections do not apply, either. In practice, almost all relevant activities require a permit, which means that the system is, in effect and despite the lack of a general ban on deteriorating natural values of Natura 2000 sites, almost watertight. Some defects and problems are referred to in 10., below.

With regard to provisions in paragraphs 1 and 2 of Article 6, the implementation is, however, far from satisfactory. Section 68 of the Nature Conservation Act deals with implementation of the Natura 2000 network:

“A site included in the Natura 2000 network shall be protected in a manner complying with its conservation objectives without delay and within six years of the Commission or Council having approved it as a site of Community interest. A bird sanctuary referred to in section 64, paragraph 1, subparagraph 1 (see 10. below), shall nevertheless be placed under protection immediately after the Commission has been notified of the site.”

The provision refers to Article 4, paragraph 4, of the Habitats Directive, but in a way also to Article 6, paragraph 1, of the Directive. However, outside the frame of the Nature Conservation Act, any provisions enabling satisfactory conservation measures presupposed in Article 6, paragraph 1, of the Directive are missing. Let us take an example. In the decisions of the Council of State it has been, as guidance for landowners and environmental authorities, indicated that the protection of the site shall be implemented, for instance, pursuant to the Soil Excavation Act, the Forest Act or the Water Act. In practice, however, these Acts do not contain any mechanisms whatsoever to establish necessary conservation measures. The Acts cannot guarantee that necessary conservation measures under Article 6, paragraph 1, will take place, but only that significant harmful impacts

referred to in paragraphs 3 and 4 are assessed and, as a rule, abated. It might be said that the system is, at least outside the realm of the Nature Conservation Act, based only on mechanisms safeguarding the integrity of the site against harmful effects caused by plans or projects presupposing a permit or an approval, but necessary conservation measures, including management plans etc., have been neglected in the Finnish legislation.

As far as Article 6, paragraph 2, of the Habitats Directive is concerned, no explicit provisions to transpose it as such into national legislation can be traced.

If the protection of the site is based on the measures provided in the Nature Conservation Act, management plans can according to Section 19 of the Act be drafted and ratified for different types of nature reserves. In practice, management plans have been drafted for certain Natura 2000 sites. E.g. for the Vattajanniemi Natura 2000 site, which to a large part is a military training area, 0,9 million euro has been budgeted for drafting a management plan in 2005. The purpose of the management plan is to coordinate the demands of military use, nature conservation and recreational use. Also damaged dune formations will be restored, old pastures will be returned to their original shape and recreational use will be directed to suitable locations. The project has been financed by EU Life Nature programme. The Ministry of Defence is to a large extent in charge of the national budget share of the project.

10. Coverage of implementation. Do national acts, plans and other rules implement the Habitats Directive fully? Are there types of enterprises, impacts on nature or licensing procedures where the requirements of the Directive are not altogether taken into account?

According to section 3 of the Nature Conservation Act, the Act transposes into Finnish law the Habitats Directive and the Birds Directive, excluding certain species specified in the Hunting Act.

As regards to the Natura 2000 network, the Act contains a chapter (Ch. 10) including specific provisions on the EU Natura 2000 network. The chapter includes sections 64-69, which have been referred to above in 9, except section 64, which subsections 1 and 2 read as follows:

"Section 64. The Natura 2000 network. The European Union´s Natura 2000 network in Finland consist of:

1) bird sanctuaries of which the European Union Commission has been notified pursuant to the provisions of the Birds Directive; and
2) sites deemed by the Commission or the Council to hold Community interest pursuant to the provisions of the Habitats Directive.

What is provided in section 8 concerning the drafting and adoption of a nature conservation programme shall correspondingly apply, as appropriate, to the drafting of a proposal for sites to be included in the Natura 2000 network. Parties affected by the decision shall be given an opportunity to state their opinion after a

public announcement is posted on the municipal notice board, as stipulated in the Public Announcements Act. The public shall be forewarned of the announcement well in advance in at least one newspaper of general circulation within the locality concerned. The State shall cover the cost for public announcements. Information on the proposal must be made available in the municipality concerned for the duration that the announcement is posted on the municipal notice board."

In the Natura 2000 decisions by the Supreme Administrative Court it has been declared that by section 64 of the Nature Conservation Act the Habitats Directive (and the Birds Directive correspondingly, where appropriate) has been transposed into national law with regard to the national proposal. It means that the criteria for proposing SCIs and classifying SPAs can be directly (and solely) found in relevant provisions of the Directives, i.e. especially Articles 4 and 5 and Annex III of the Habitats Directive and Article 4 of the Birds Directive.[8]

Implementation of provisions found in Article 6 (cf. also Article 7 concerning SPAs) has been described above in 9. The basic shortcoming is that safeguarding of the integrity of the site – especially if the protection measures are not based on the Nature Conservation Act, but the Soil Excavation Act, the Forest Act or the Water Act – relies only on permit or planning procedures. If an activity may take place without a permit etc., the safeguarding mechanisms provided for in sections 65 and 66 of the Nature Conservation Act do not apply (minor activities outside planned areas, such as building of a road on one´s own land or soil excavation to household purposes).

An example may clarify perhaps the most relevant practical problem. Suppose a Natura 2000 site, or more likely a part thereof, which is "protected" according to the Forest Act. Under this Act, no permit is required for normal logging operations, which may be carried out after notifying the Regional Forest Centre at least 14 days before the operation in question (some 100 000 logging notifications are made annually, which may explain why a permit system has not been stipulated). In principle, the assessment provided in section 65 of the Nature Conservation Act is necessary but even if the Forest Centre found that natural values protected by Natura 2000 were to be endangered, the Forest Act does not, at least explicitly, provide any mechanism to prevent the operation. Section 66 of the Nature Conservation Act does not apply, because no permit granting or plan adoption can take place within the system of the Forest Act. In practice, the Forest Centre would probably, if it notices a probable deterioration of ecological values in advance, consult the Regional Environmental Centre, which could impose a temporary injunction on the basis of section 55 of the Nature Conservation Act. This, in turn, would lead to protection of the spot under the instruments of the Nature Conservation Act, i.e. a more stringent protection regime than was originally intended.

Given that safeguarding mechanisms are structurally based on existing permit systems throughout the legislation (outside the Nature Conservation Act), no

[8] See e.g. SAC 2000:40-44.

instrument has been provided for situations where existing land use within or in the vicinity of a Natura 2000 site would hazard the site´s integrity, unless a change in the existing land use launches an obligation to apply for a permit or for the adoption of a plan. Hence, Article 6, paragraph 2, of the Habitats Directive has not been duly implemented. [9] In practice, of course, the threshold to apply for a permit is interpreted to be lower in cases, where significant ecological values are at stake.

11. Assessment of impacts. Which authority decides on whether an assessment is to be made or not? If harmful effects on a Natura 2000 site are probable, which party is responsible for assessing the impacts: Applicant, Environmental authority, Licensing authority, etc? How is the appropriateness of the assessment ascertained? If the applicant is required to assess impacts, does he/she have access to the data that prompted the inclusion of the area into a Natura 2000 site?

Any authority dealing with a permit application or a matter concerning approval of a plan is obliged to ascertain that an appropriate assessment is conducted (see section 65 of the Nature Conservation Act, referred to above in 9.). The relevant authorities are municipal and State authorities at different levels, handling different types of matters (e.g. municipal councils approving plans, municipal boards issuing building permits, Environmental Permit Agencies granting water management permits and certain environmental permits, to mention just a few). In the last instance it is up to the Supreme Administrative Court to decide how this section shall be interpreted.

This implies that there is no competent authority, which in advance, irrespective of a concrete permit application, could define whether an assessment should be conducted or not. In practice, however, the opinion of a Regional Environment Centre has a considerable guiding importance but only the authority responsible for granting a permit can in a legally effective way resolve whether the assessment threshold will be exceeded.

However, in projects to which an environmental impact assessment procedure shall be applied according to the Act on Environmental Impact Assessment Procedure[10] it may be clear from the beginning that an assessment shall be carried out (list of projects having significant adverse environmental impacts in the Decree on Environmental Impact Assessment Procedure, based on Annex I of the EIA Directive). If a project or a plan to which the mandatory EIA Procedure shall be applied (e.g. large-scale industrial plants, motorways and large mining projects) will be located inside or in the vicinity of a Natura 2000 site, the assessment provided for in Article 6, paragraph 3, of the Habitats Directive shall

[9] See e.g. Kari Kuusiniemi, Biodiversiteetin suojelu ja oikeusjärjestyksen ristiriidat, Oikeustiede-Jurisprudentia 2001, pp 156-306, at pp 180-184 with further references (with an English Summary: Protection of Biological Diversity and Contradictions within the Legal Order, pp 305-306). The situation is may be changed in connection with the implementation of the Environmental Liability Directive.

[10] This Act has been enacted (and amended) to transpose the EC EIA Directive and its Amendments into Finnish law.

be conducted as a part of the EIA procedure (see section 65, subsection 1 *in fine*, of the Nature Conservation Act).

The developer or the implementer of the plan is responsible for the assessment. In practice, there are several consulting companies having expertise in conducting the assessment. The authority responsible for granting the permit or adopting the plan shall see that an appropriate assessment has been carried out before the permit application or adoption of the plan may be decided. The authority shall thereafter request an opinion from the Regional Environment Centre and the authority in charge of the site in question. The opinion shall be given without delay, within six months at the latest (see section 65, subsection 2, of the Nature Conservation Act).

If no assessment has taken place or the assessment is found dissatisfactory, the authority is not empowered to grant a permit or adopt a plan (section 66 of the Nature Conservation Act). If the assessment, although necessary, has not been carried out, an authority notified of a project or plan referred to in paragraph 1 (e.g. logging on a Natura 2000 site), shall take steps within its jurisdiction to suspend the implementation of the project or plan until the assessment described in section 65, subsection 1, is carried out and the opinions referred to in subsection 2 have been submitted. The authority shall also notify the Regional Environment Centre of the matter at a sufficiently early stage for the Centre to take any necessary action (section 65, subsection 3, of the Act). If a Court finds that a necessary assessment has not been carried out, the decision of the authority shall naturally be repealed.

The public has, with only rare exceptions and without being obliged to express any specific reason, access to the scientific data, which has prompted the inclusion of the site into network Natura 2000. According to the Finnish Constitution (731/1999), section 12, subsection 2, the documents and other records in the possession of the authorities shall be in the public domain, unless access to them has for unavoidable reasons been specifically restricted by an Act. Everyone shall have the right to access to information in a document or record in the public domain. This right has been proclaimed also in the Act on the Openness of Government Activities (621/1999), which also includes certain exceptions concerning access to documents (e.g. official documents containing information of endangered animal or plant species or the protection of important natural habitat, if access would compromise the protection of the species or the habitat; section 24, subsection 1, point 14). In practice, it should be clear that a developer or plan implementer is entitled to have access to all relevant information at least in capacity of a party (see section 11, subsection 1 of the Act).

How is assessment of impacts caused by projects or plans in combination with other projects or plans safeguarded?

In section 65, subsection 1, of the Nature Conservation Act it is explicitly enacted that obligation to assess impacts concerns not only a project or a plan as such but

its impacts in combination with other projects or plans. Hence, the law is clear but the practice may be more multi-layered.

E.g. concerning the new port of Helsinki, Port Vuosaari, situated in close vicinity of a Natura 2000 site (SPA and SCI), the assessment was conducted before the approval and confirmation of the regional plan, where the port including road and rail connections had been reserved (see SAC 2002:48, below in 12.). Later on the Supreme Administrative Court has resolved appeals against some 20 decisions linked to the Vuosaari project (detailed plan, different water management permits including e.g. dredging and constructing a bridge across the Natura 2000 site, environmental permit, expropriation of railway area, approval of a road plan, etc.).

In case SAC 2004:26 (master plan for south-eastern part of Vantaa, including road and rail connections for Port Vuosaari) it was, i.a., claimed by the appellants that a draft mall project which was simultaneously under planning in the vicinity of the Natura 2000 site should have been taken into consideration in the impact assessment according to Article 6 of the Habitats Directive and section 65 of the Nature Conservation Act. The Supreme Administrative Court referred to Article 6, paragraphs 2, 3 and 4, of the Habitats Directive and to the Commission guidelines concerning protection and management of Natura 2000 sites and emphasised that the assessment procedure had been carried out already before the confirmation of the regional plan. The Court reasoned that draft plans concerning a mall in the neighbourhood of one (other) part of the site (consisting of four parts) did not constitute an actually proposed project plan presupposed in Article 6 and the Commission guidelines, which should have been taken into consideration when the confirmation of the regional plan was resolved.

C. Case examples of how possible impacts on Natura 2000 areas are taken into account in the licensing procedure

12. Examples of licensing decisions regarding projects outside or inside Natura 2000 sites, where

- *Assessment of impacts was not deemed necessary*

  In case SAC 2001:67, the Ministry of the Environment had not confirmed a regional plan adopted on 15th November 1996,[11] as regards a public road delineation crossing a Natura 2000 site. No specific impact assessment according to section 65 of the Nature Conservation Act had been conducted.[12] The Supreme Administrative Court repealed the Ministry´s decision and referred the case back to the Ministry for reconsideration. The Court noted that the Natura 2000 site in question comprised only the water area representing natural habitat type 3210 (Fennoscandian natural rivers) and that the protection of the site would, according to the Council of State´s Natura 2000 proposal, be based on the Water Act. A road plan had been approved

[11] I.e. before the national Natura 2000 network proposal had been drafted.
[12] Because the Act entered into force 1.1.1997!

previously, and the Water Court (nowadays: Environmental Permit Agency) had issued a permit to construct a bridge across the river and rapids. The assessment of values of nature made in connection with the road plan indicated that the bridge would not reduce the riverbed area. Because the habitat type in question was not touched and habitats of species typical for the natural habitat type not were reduced and because scenic deterioration (spoiling of the landscape) did not have legal relevance the Court found that there was no obligation for a specific Natura assessment.

This implies that the Court considered the duty to assess impacts strictly, taking into account only the conservation objectives (of the relevant part) of the site. Although aesthetic deterioration was not relevant when Natura provisions were at stake, the Ministry could, of course, pursuant to relevant provisions concerning regional plan in the Building Act, have rejected the plan e.g. on the basis of deterioration of the landscape. However, the Court could only take a stand on the obligation for assessment in this context. Moreover, the facts of the case reduced the real relevance of confirmation of the regional plan: the road plan had been approved previously and a permit for the construction of the bridge had been granted; both decisions had gained legal force.

One other example was SAC 1.11.2001 nr 2701 (short referate)[13]. A detailed shore area plan included three islands within a Natura 2000 site and a mainland area adjacent to the site. New building sites had been assigned on one of the islands and on the mainland. The Supreme Administrative Court stated that the site was a sea protection area of 65 000 hectares representing 12 natural habitat types and being a habitat of 24 bird species (Annex I of the Birds Directive) and several migratory birds. According to a report on the area´s natural values, which was included in the plan records, there was possibly a small narrow bay (flad, a coastal lagoon) in the plan area, but no other natural habitats or habitats of species. Implementation of the site´s protection would be based on the Water Act. Building activity enabled by the approval of the plan did not as such affect the status of the flad. Land use allotted in the plan was not likely to have a significant adverse impact on natural values to be protected at the site.

There are several unpublished decisions by the Supreme Administrative Court, where the Natura assessment has been discussed but found unnecessary.[14] In

[13] There are two types of published precedents of the Supreme Administrative Court: most important yearbook decisions and less important short referates. However, the vast majority (on an average some 97 per cent) of the decisions of the Court remain unpublished.

[14] E.g. in SAC 1.12.2005 nr 3220 one dissenting justice had the opinion that an assessment should have been carried out before a municipal master plan covering shore areas could be adopted. There was a reservation for wind power plants on an area, on which there were already four wind power plants. These plants had been built previously according to valid permits. The majority of the Court found the area reservation declaratory, and the plan did not enable building of more plants without a more detailed planning decision. In SAC 27.6.2005 nr 1625, the Court upheld the decisions of lower instances, which had regarded that building of a small jetty did not presuppose

SAC 14.2.2005 nr 291, the Ministry of Trade and Industry had given a mine patent order against which the Regional Environment Centre lodged an appeal. The mining company had carried out an assessment, and the Ministry had requested the opinion of the Environment Centre. The company had supplemented the assessment in all respects indicated in the opinion, and therefore the Ministry had found it unnecessary to request a further opinion of the Centre. On the basis of the assessment, the project was not deemed to have adverse impacts on a Natura site located in the neighbourhood of the mine patent area. The Court shared the view of the Ministry reasoning that the decision was not illegal even if the Ministry did not request the opinion of the Environmental Centre according to section 65, subsection 2, of the Nature Conservation Act, because on the basis of the supplementary information it could be seen that the preconditions for obligation to conduct an assessment did not exist (section 65, subsection 1, of the Act).

Actually, in quite a few cases an initial assessment has been done, indicating that no legal obligation to carry out an official section 65-assessment exists. But on the contrary, if no assessment has been conducted, the precautionary principle expressed e.g. by the European Court of Justice in Dutch Cockles case (C-127/02, at 39-45), will prevent granting a permit unless it can be excluded, on the basis of objective information, that the project will have a significant effect on the site´s conservation objectives, either individually or in combination with other plans or projects.

In some cases the Supreme Administrative Court has found that an assessment should have been carried out, and, because of lacking assessment, it has repealed a decision. Let us take two fresh examples of the precedents of the Court.[15]

In SAC 2005:42, the Ministry of Trade and Industry had issued a permit according to the Mining Act to investigate an area. The area in question was situated within the boundaries of an SCI (Kirkkonummi Archipelago) but actual investigating area had not been included in the vast site. Taking into consideration of the location of the investigation area in the immediate neighbourhood of the Natura site, the Court reasoned that the Ministry had not had enough information to determine whether an assessment provided in section 65 of the Nature Conservation Act should have been conducted. The

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conducting of a Natura 2000 impact assessment. – In addition to these, e.g. in SAC 2006:35 the Environmental Permit Agency found that installation of a sewer pipeline under a river bed, which had been included in network Natura 2000 e.g. as habitat of a mollusc species (*Unio crassus*) did not presuppose a section 65-assessment. In its appeal in the Supreme Administrative Court the Regional Environment Centre claimed only that a permit of the Centre pursuant to section 49 of the Nature Conservation Act (concerning species mentioned in Annex IV(a) of the Habitats Directive) should have been applied for the project (i.e. not only a permit according to the Water Act).

[15] In this context it may be mentioned that in SAC 8.3.2002 nr 495 (short referate) it was held that also a master plan without formal legal effects was to be considered as a plan indicated in sections 65 and 66 of the Nature Conservation Act.

Court referred to the precautionary principle, which according to the judicature of the European Court of Justice had to be taken into account in interpreting Article 6, paragraph 3, of the Habitats Directive.

In SAC 2005:69, the municipal council had adopted a detailed shore area plan covering 45 hectares of land on an island in Lake Saimaa. The plan area was included in a Natura 2000 site as a habitat of a priority species found only in Finland, lake Saimaa ringed seal (*Phoca hispida Saimensis*). In the plan, 12 building lots were assigned on the shore area of the island, which was situated in the middle of a breeding area of seals. The Natura 2000 site in question had been evaluated to be the habitat of 18-26 seals, comprising some nine per cent of the whole seal population. No assessment according to section 65 of the Nature Conservation Act had been made. The Supreme Administrative Court repealed the decisions of the Administrative Court and the municipal council. Land use indicated in the plan, evaluated also in combination with existing summer cottages around the area, would probably have a significant adverse effect on natural values, for the purpose of protecting of which the site had been included in the network.

- *Impacts were assessed but not deemed adversely affect the integrity of the site concerned*

The best-known and probably most contentious decision falling into this category concerns the Port Vuosaari in Eastern Helsinki, within the borders of the City. The port in in close vicinity of the Natura site FI0100065 (Mustavuori Herb-rich Forest and Östersundom Waterfowl Habitats). The site (SCI and SPA) consists of four separate areas. The railway connection to the port will cross one part of the Natura 2000 site on a bridge over its narrowest point (less than 100 metres, crossing the very narrow bay of Porvarinlahti). The other three parts, consisting mainly of water area and wetlands, are further away, two-three kilometres as a maximum, from the Port.

The first and decisive case in the extensive series of appeals was SAC 2002:48, where the Supreme Administrative Court, on the basis of impact assessment and several expert opinions, found that the port including its road and rail connections would impair the ecological values of the site. However, a closer evaluation of those bird species and habitat types, for the protection of which the site had been included in the network proposal, showed that no significant adverse effects to the conservation objectives of the site would result. The decision of the Ministry of the Environment to confirm the regional plan was upheld.

Space does not allow us to analyse the extensive scientific data provided in the assessment procedure and opinions requested. Expectedly, experts took strongly opposing views concerning the relevance of the impacts. However, the Court which referred to e.g. Article 6 of the Habitats Directive (indirect effect on the interpretation of national rules) and the Commissions

guidelines[16], was convinced that noise effects from the proposed port and a railway bridge to be constructed to cross one narrow part of the site would not significantly adversely affect the integrity of the site. There were no habitats of rare bird species in the neighbourhood of the planned bridge and this part of the site was not among the most important for the protection of the bird species affected directly by the construction. Even if the Court analysed the impacts specifically concerning every relevant species and habitats, it emphasised that applying of section 66, subsection 1, of the Nature Conservation Act (so-called ban on deterioration) presupposed a coherent evaluation of the impact on the relevant habitats.

Case SAC 2006:3 concerned dredging in order to maintain a fairway. The Water Court had in 1990 issued a permit for dredging the passage from a boat marina, situated by the river, through a sea bay. The project was not implemented while the permit was in force and, hence, a renewed permit was applied for. Permit was granted, but the decision was appealed to the Supreme Administrative Court. Meanwhile, the bay had been included in network Natura 2000 as an SPA and, the Court therefore repealed the decision in 2000 and the case was referred back to the permit authority for reconsideration. A Natura 2000 impact assessment was conducted, and the Ministry of the Environment[17], in its opinion, regarded the dredging itself as rather harmless but maintained that the ensuing increase of boat traffic would significantly impair the ornithological value of the site. However, the detriment caused by the traffic could be reduced by bans and restrictions on boat traffic during spring migration and nesting season. The Court disallowed appeals lodged by two real estate owners and two NGOs, but it added some restrictive provisions to the permit. The project shall be carried out between 1st November and 31st March. The works must not be executed unless a ban on traffic on the Natura 2000 site (water area) will be in force until 15th May. Also certain existing restrictions on boat traffic on the bay shall be kept in force. Under these circumstances the project including dredging of existing passage (some 25 000 cubic metres, approximately three kilometres) was not found to have any significant harmful impacts on the relevant natural values.[18]

- Impacts were assessed and deemed significant

There are only exceptional cases falling into this category. Obviously, if the assessment shows significant adverse impact on the conservation objectives of

[16] "Managing Natura 2000 sites. The provisions of Article 6 of the ´Habitats´ Directive 92/43/EEC, April 2000" and "Assessment of plans and projects significantly affecting Natura 2000 sites. Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC, November 2001".

[17] The opinion was requested from the Ministry, because the Regional Environment Centre had been supporting the project (see section 65, subsection 2, of the Nature Conservation Act).

[18] There are also other decisions of the Supreme Administrative Court where restricting conditions in the permit have guaranteed that no significant adverse impact will result (see e.g. SAC 2005:57 concerning permit for a large-scale ground water intake project and SAC 2004:52 concerning permit for exploring possibilities for producing artificial ground water).

the site, the developer is likely to change the project because the threshold to grant an exemption is so high. However, it may happen that the authority granting a permit or adopting a plan may on the basis of the assessment and opinions requested conclude that no significant adverse effects are likely. Still, the Court may have the opposite view.

One example concerns the very site to host the excursion of this EUFJE Conference. In SAC 3.1.2005 nr 1, the municipal council had, on the application of landowners, approved a detailed plan on the shores of three small lakes inside the Natura 2000 site *Nuuksio*. The plan included i.a.12 new and one existing summer cottage sites. The Regional Environment Centre lodged an appeal against the decision, which was repealed by the Administrative Court. The Supreme Administrative Court disallowed the landowners´ appeal and upheld the resolution of the Administrative Court. According to the Supreme Administrative Court, the plan area was an integral part of the ecological totality in the wilderness-like Nuuksio lake and highlands area. Taking also into account the evident consequences of building activity in accordance with the plan, the Court found that the assessment and opinion procedure provided for in section 65 of the Nature Conservation Act showed that the plan would have a significant adverse impact on conservation objectives of the site. Hence, pursuant to section 66, subsection 1, of the Nature Conservation Act the decision to adopt the plan had been illegal.

13. Relevance of Community decisions. What kind of influence has the judicature of the ECJ had on national decisions (e.g. the precautionary principle). Relevance of the Commission guidelines on Managing Natura 2000 sites?

The precautionary principle proclaimed e.g. in the above-mentioned Dutch Cockles case was referred to in case SAC 2005:42 (above in 12.). Community guidelines have been referred to as legally relevant material e.g. in certain cases concerning Port Vuosaari (above in 12.).

As a rule, at least the majority of permit authorities[19] and all administrative Courts follow the precedents of the European Court of Justice and look for assistance at the Commission guidelines, too.

14. Examples of licensing decisions concerning exemptions from the protection (Article 6 paragraph 4)

- *Which authority decides on exemptions and which authority on appeals?*

The Council of State decides on exemptions (about the preconditions see section 66 of the Nature Conservation Act, above in 9.). Appeals against its

[19] Maybe the expertise in small municipalities (there are more than 400 units of local government in Finland) does not cover nuances of EC Law. However, in most cases expert authorities at State level take part in the procedures in one way or another, which enables a correct application of EC Law.

decision shall be lodged in the Supreme Administrative Court. The appeal may only be founded on the illegality of the decision.

- *Have exemptions been applied for and have they been granted?*

No affirmative decisions have been made.

The Council of State had one application pending (confirmation of the regional plan for Vuosaari Port), but the Council of State rejected the application as unnecessary, because it found that the assessment procedure and the requested opinions indicated that the plan would not have a significant adverse effect on the natural values, which had been the basis for inclusion of the site in the network Natura 2000.

The Supreme Administrative Court (SAC 20.12.2000 nr 3307) held that the system pursuant to sections 65 and 66 of the Nature Conservation Act did not allow the Council of State to define whether an exemption is necessary or not. The authorities responsible for the adoption and confirmation of the regional plan shall *prima facie* resolve whether an exemption is necessary or not. Hence, the Court did not decide the material issue in this context but later on, as the appeals lodged against the ratification of the regional plan were resolved (SAC 2002:48, above in 12.).

- *Grounds for refuting and allowing an exemption (alternative solutions, imperative reasons of overriding public interest, opinions of the Commission)*

See the previous answer.

The Council of State (decision 13.10.2005 nr YM6/577/2004) has rejected one application. A water services company owned jointly by a municipality and industrial companies had applied for a permit according to the Water Act in order to turn a fresh water basin (144 hectares, a part of which was an SPA) back into a sea bay. Having received a negative opinion concerning the project from the Regional Environment Centre, the Environmental Permit Agency offered the company an opportunity to apply for an exemption on the basis of sections 65 and 66 of the Nature Conservation Act.

The Council of State stated that the threshold (imperative reasons of overriding public interest) provided in section 66, paragraph 2, of the Nature Conservation Act, had been set high. The Council of State noted that in Finland no case concerning said exemption had been resolved before. In other Member States projects, which have been considered to meet similar preconditions have been necessary for the infrastructure of the society, such as motorways, railways or ports. Economic consequences for water services, which would result from non-implementation of the project would have only local relevance and be rather modest. Hence, the preconditions were not met.

- *In case an exemption has been granted, how has the incurred loss to protected values of nature been re-compensated? How has the Commission reacted?*

See the previous answer. About the law, see section 69, subsection 2, of the Nature Conservation Act, above in 9.